United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1713

United States Court of Appeals

For the Second Circuit

No. 74-1713

In the Matter of
A Motion to Compel Arbitration
between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

and

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

BRIEF FOR PETITIONER-APPELLEE

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Petitioner-Appellee
One State Street Plaza
New York, N. Y. 10004

JAMES M. ESTABROOK
LENNARD K. RAMBUSCH
STEPHEN R. REMSBERG
of Counsel

TABLE OF CONTENTS

Cases Cited

Other Authorities Cited

Statute Cited

United States Court of Appeals

For the Second Circuit

No. 74-1713

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

and

NATIONAL SHIPPING AND TRADING CORPORATION AND HELLENIC INTERNATIONAL SHIPPING, S.A.

Respondents-Appellants.

BRIEF FOR PETITIONER-APPELLEE

Statement of Issues

The issue presented on this appeal is whether the Trial Judge was clearly in error in holding appellants, National Shipping & Trading Corp. (hereinafter referred to as guarantor) and Hellenic International Shipping, S.A., (hereinafter referred to as charterer) required to proceed to arbitration pursuant to a petition filed by appellee Interocean Shipping Co. (hereinafter referred to as shipowner), after a preliminary trial during which only testimony from live witnesses was introduced.

Statement of the Case

This was an action commenced by the shipowner to compel arbitration under the Federal Arbitration Act (9USC §¶ 1 *et seq.*) pursuant to an agreement reached March 17, 1971, to charter shipowner's 49,283 ton OSWEGO RELIANCE for one year at $5.60 per ton per month on the Mobiltime form with a suitable drydocking clause to be worked out.

When shipowner first filed a petition it made a motion on affidavits for immediate arbitration. This motion was granted by Judge Bonsal. On appeal this Court reversed and even though the affidavits were substantially uncontradicted, held guarantor and charterer entitled to a preliminary trial, 462 F.2d. 673 (1973).

This preliminary trial was duly held on April 25, 26, 27 and May 2, 1973. After hearing the witnesses Judge Ryan rendered his opinion in favor of shipowner directing charterer and guarantor to proceed to arbitration. It is from this decision that charterer and guarantor appeal.

The Evidence

The testimony at the trial of this action was given by witnesses present in Court. The trial judge having found in favor of shipowner, its burden on appeal is only to show that the opinion was based on credible evidence. We therefore have limited our discussion of appellant's testimony primarily to concessions in shipowner's favor. The discussion of the evidence, for the sake of convenience, will be subdivided according to the testimony as to events occurring each day.

March 17, 1971

The first witness to testify as to discussions and events on March 17, 1971 was Mr. Francis DeSalvo, an independent ship broker, who is Vice President of the charter-

brokerage firm of Poten & Partners, Inc. Mr. DeSalvo testified he had been Vice President and Chief Executive Officer of this firm for four years. (R. 12; App. 64a, p. 2-3) In the course of his career as a ship broker, Mr. DeSalvo testified that he had fixed several ships for the interests of respondent National and its principal, Harry Theodoracopulos. (R. 96) The relationship between Mr. DeSalvo and Mr. Theodoracopulos was quite close. They had, prior to these negotiations, traveled together in Spain and had done a lot of business together over the years. (R. 233) Mr. DeSalvo had also fixed one or two ships on the spot market for the interests of Bethlehem Steel Corportation, which owned petitioner Interocean. (R. 89)

Mr. DeSalvo testified that on March 17, 1971, he had lunch at the Alfredo Restaurant with Mr. Harry Theodoracopulos of National. (R. 17, 99) At this luncheon, Mr. DeSalvo and Mr. Theodoracopulos discussed generally the outlook for the tanker charter market. This discussion concerned general availability and profitability of tankers of approximately 20,000 tons up to 250,000 tons, but Mr. DeSalvo could not recall that any specific vessel was discussed during lunch. (R. 18, 99)

Mr. Theodoracopulos confirmed that the luncheon had taken place, and also added that he had invited Mr. DeSalvo to lunch because he had known that Mr. DeSalvo had recently returned from Europe, and Mr. Theodoracopulos wanted to obtain the benefit of any gossip Mr. DeSalvo had picked up in Europe on the long-term prospects of the tank time charter market. The luncheon was also attended for a short period by Mr. Thomas Spears, President of National. (R. 208-209, 247-248) After Mr. Theodoracopulos "picked his [DeSalvo's] brains a little bit, or tried to", he discussed the possibility of chartering a vessel for National's account for approximately a one-year period, and then using the vessel for speculation on subcharters. (R. 209) No specific vessel was, however, mentioned at the luncheon. (R. 209)

Following lunch, Mr. DeSalvo received a phone call from Mr. Theodoracopulos asking him what ships might be available in the 50,000-ton class for a short-term period. Mr. DeSalvo knew that the OSWEGO RELIANCE was available and had heard in the morning that owners were willing to fix it at a rate close to the market. Mr. Theodoracopulos instructed Mr. DeSalvo to bring him a firm offer for the vessel, which meant contact the owners of the OSWEGO RELIANCE and determine the specific terms for a charter. (R. 18, 99-100, App. 64a, pp. 4-6)

Mr. Theodoracopulos confirmed that he had in mind taking a vessel of around 50,000 tons for a year's period at a rate of approximately $5.50 per ton. Following the luncheon, he telephoned Mr. DeSalvo to ask him to find out whether or not a vessel which Mr. DeSalvo had mentioned at lunch was available. Mr. Theodoracopulos said that Mr. DeSalvo called him back a short time later, stated he had checked with owners, that the vessel was still available. Mr. Theodoracopulos then instructed Mr. DeSalvo, "Alright, bring it in firm." (R. 210)

Mr. DeSalvo telephoned Mr. Anthony Germano of Steamship Service, a subsidiary of Bethlehem which acted as a charter broker for Bethlehem interests, to see if the OSWEGO RELIANCE were available and on what terms owners would charter her for a one-year period. Mr. Germano called back with the terms of his offer at about four o'clock in the afternoon. (R. 19, 100, App. 64a, p. 9) Mr. DeSalvo took careful notes of Mr. Germano's offer. (R. 100, App. 61a) Mr. DeSalvo immediately called Mr. Theodoracopulos at approximately four o'clock in the afternoon, and related to him the full offer he had received from Mr. Germano. The offer was as follows:

> "The OSWEGO RELIANCE, an ore-oil carrier, 49,283 deadweight, 39'-5⅞" draft, 16.5 knots on 100 tons bunker C per day, cubic capacity of 1,968,842 cubic feet at 98%. Crude and/or dity petroleum products

maximum three grades within natural segregations; maintain heat 135; coiled wing tanks only; delivery one safe port Persian Gulf excluding Fao and Abadan at charterer's option. Lay days March 31/ April 15 ETA April 1st; redelivery one safe Persian Gulf port at owner's option; trading worldwide within Institute Warranty's Limits excluding China, North Viet Nam, North Korea, Cuba, Israel, and all other Communist countries; overtime and petties $750.00 per month; rate $5.75 per deadweight ton per month; suitable drydock clause scheduled for November, 15 days; mobiltime sub-details." (Emphasis added.)

The offer called for the payment by Interocean of brokerage commissions of 1¼% of the charter hire each to Poten and to Steamship. (R. 24-26, App. 61a, 64a, pp. 9-10) The offer was made subject to a reply at 4:45 p.m. by National. (R. 101, App. 65a, p. 9)

During the same telephone conversation and after hearing this offer, Mr. Theodoracopulos immediately offered a partial counter proposal. Mr. Theodoracopulos stated that he required additional information as to the pumping capacity of the vessel, and identification of the last two cargoes carried by the vessel. In addition, Mr. Theodoracopulos stated that the term would be one year, plus or minus 30 days. Overtime and petties of $500 and a rate of $5.50 per deadweight ton per month were required. Mr. Theodoracopulos specified a mobiltime charterparty, excluding clauses 9, 12 A ii, 12B ii and 12C iii. He stated that a suitable drydock clause was to be worked out with sufficient advance notice. The charterer was to be Hellenic International Shipping, S.A. of Panama. These terms were copied down by Mr. DeSalvo as part of his notes of the negotiations. (R. 26, App. 61a, 65a, p. 12) Mr. Theodoracopulos admitted receiving the offer as set

forth above and that Mr. DeSalvo's notes contained an accurate statement of what he said in response. (R. 211-213)

Mr. DeSalvo's notes also reflect that Mr. Theodoracopulos identified the charterer of the OSWEGO RELIANCE to be Hellenic International. Mr. Theodoracopulos identified Hellenic as a subsidiary of National Shipping. (R. 26, 97-98, App. 65a, p. 12) Mr. Theodoracopulos has testified that he did not identify Hellenic as a subsidiary of National Shipping. (R. 213-214) But later, at R. 214, Mr. Theodoracopulos admitted that National did have subsidiary companies and that he might have told Mr. DeSalvo that one of National's subsidiaries would be the charterer.

Mr. DeSalvo then called Mr. Germano back to communicate to him the terms of Theodoracopulos' counter proposal. Owners were to reply to the counter proposal by 4:55 p.m. on March 17, 1971. The conversation with Mr. Germano took place sometime between 4:00 and 4:30 that afternoon. Mr. Germano told Mr. DeSalvo the pumping capacity of the vessel was three pumps, 1,300 tons water per hour each at 100 p.s.i. He indicated the last two cargoes were dirty petroleum products. He accepted the other terms of the counter offer with the following conditions:

Overtime and petties were to be $750 per month and charter hire was $5.65 per deadweight per month.

This response also demanded a reply by 4:55 p.m. that afternoon. (R. 27, App. 65a, p. 14-15) Mr. DeSalvo immediately called Mr. Theodoracopulos with these terms. Mr. Theodoracopulos responded with a proposal of $600 for overtime and petties and $5.55 for charter hire. This was passed to Mr. Germano, who stated that owners would accept $5.60 for charter hire and $650 for overtime and petties. Mr. DeSalvo again called Mr. Theodoracopulos, and Mr. Theodoracopulos accepted that proposal, saying

in words to the effect, "You are confirmed." (R. 28, App. 65a, pp. 15-16)

When Mr. DeSalvo informed Mr. Germano of the initial counter proposal from Mr. Theodoracopulos, Mr. DeSalvo informed Mr. Germano as to the identity of the charterer. Mr. Germano, apparently not knowing Hellenic, indicated that owners would require a guarantee of the performance of the charter. In the following telephone conversation with Mr. Theodoracopulos, Mr. DeSalvo mentioned owners' demand for a guarantee. Mr. Theodoracopulos agreed that a guarantee would be forthcoming from National. The specific form of the guarantee was not discussed between Mr. DeSalvo and Mr. Germano. It was discussed between Mr. DeSalvo and Mr. Theodoracopulos to the extent that the form would be similar to guarantees Mr. DeSalvo had previously prepared under charters on which he and Mr. Theodoracopulos had both been involved. (R. 30, App. 65a, pp. 17-19) This requirement also appears in Mr. DeSalvo's contemporaneous notes (App. 61a).

Following the last telephone conversation between Mr. DeSalvo and Mr. Theodoracopulos, which was approximately 4:45 p.m., Mr. DeSalvo prepared the fixture telex which was sent to both parties. (R. 31) The telex to National, stated as follows: (App. 42a)

"THEOTRAN NY
POTEN AND PARTNERS INC MAR 17 1971
ATTEN:
MR. H. THEODORACOPULOS
CONFIRM HAVING FIXED FOR YOUR ACCOUNT
TODAY AS FOLLOWS:
OWNER: INTEROCEAN SHIPPING COMPANY
CHARTERER: HELLENIC INTERNATIONAL SHIPPING
S.A. OF PANAMA
SUBSIDIARY OF NATIONAL SHIPPING AND TRADING
WITH APPROPRIATE LETTER OF GUANRANTEE.
'OSWEGO RELIANCE'
49,283 DWT 39 FT ⅝ INCHES DRAFT CUBIC 98
PERCENT 1,968,842

3 PUMPS 1300 TWPH EACH
16.5 KNOTS ON 100 BUNKER C PER DAY
DELIVERY/REDELIVERY PG EXCLUDING FAO AND ABADAN
LAYCAN MARCH 31/APRIL 15 1971 ETA APRIL 1, 1971
CRUDE AND/OR DPP MAX 3 GRADES WITHIN NATURAL
SEGREGATIONS
MAINTAINING HEATING 135 DEG F
COILED WING TANKS ONLY
TRADING WORLDWIDE WITHIN 1 WL EXCLUDING COMMUNIST COMMUNIST
CONTROLLED CHINA, NORTH VIETNAM, NOR KOREA,
CUBA
PERIOD ONE YEAR PLUS OR MINUS 30 DAYS
MOBILTIME EXCLUDING CLAUSES 9, 12AII, 12BII, 12BIII
SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR
NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER
NOTICES
PERFORMANCE REVIEW EVERY SIX MONTHS
OVERTIME AND PETTIES $750. PER MONTH
RATE $5.60 PER DWT PER MO PAYABLE U S DOLLARS
IN NEW YORK
THANK YOU FOR THE OPPORTUNITY TO CONCLUDE THIS
BUSINESS
THEOTRAN NY"

It is undisputed that the telex was received by the telex machine at National's offices at 5:36 p.m. on March 17, 1971. The telex machine was in operating condition, as evidenced both by the fact that it received the telex in full and also because the machine responded with an automatic confirmation of receipt of the telex. (R. 34, 233, 154) National did not respond by telex to Poten either that evening nor the following day. The telex was apparently shown to National's President Spears immediately after its receipt.

Spears, in turn, brought it to the attention of Mr. Theodoracopoulos prior to six o'clock p.m. the same day. (R. 217-218, 250) Mr. Theodoracopulos testified that no one was available at National who could operate the telex machine in order to send a reply that night. (R. 218) Spears testified, however, that someone was definitely on duty in the telex room because this employee brought the telex to him. (R. 250) Spears testified that he was in the office, carrying out computations on a new Olivetti computer. (R. 217, 220-221) Mr. Theodoracopulos stated that he tried to telephone Mr. DeSalvo to inform him that the vessel had not been fixed, and that the fixture telex was premature, but no one answered the telephone at Poten. (R. 218) Mr. DeSalvo testified that he received no protest either by telex or telephone on March 17 or any other time after the fixture had been sent out. (R. 35) It could be inferred that the offices of Poten were still open at 6:00 because the office did not open for business until 11:00 in the morning. (App. 65a, p. 24)

According to Mr. DeSalvo, two terms of the agreement were left subject to finalization later. These terms were a specific drydocking clause to conform to the agreement which had been reached as to the timing of the drydocking and the duration. It was to be worked out later what notices had to be given. The agreement of the parties also specified that the charterparty would be on a mobiltime form "sub-details". To Mr. DeSalvo, who was also testifying as an expert, "sub-details" meant filling in the blanks of the charterparty, a printed form, so that the agreement would conform with the oral agreement previously reached. Both of these items are reflected in the fixture telex. (App. 65a, p. 21-23)

Mr. Theodoracopulos clearly understood the meaning of the word "fixture", and he defined it at the trial as follows: "The word fixture means to me the conclusion of a negotiation." (R. 232) There is no dispute that the wording of the fixture telex was clear. While both Mr. Theodora-

copulos and Spears contended that the fixture telex was incorrect, neither testified that he did not understand the wording of the fixture telex. With respect to the clause of the telex dealing with the guarantee, Spears testified that National was to issue a guarantee of the charterer's performance. (R. 303)

March 18, 1971

Mr. DeSalvo testified that he received a telephone call from Mr. Theodoracopulos in the morning of Thursday, March 18, 1971, sometime before noon. Mr. DeSalvo's recollection is clear that he never received a protest that the vessel had not been fixed, nor did he receive any protest that the terms of the fixture telex inaccurately represented the agreement of the parties. (R. 34-35) Mr. Theodoracopulos testified that he telephoned Mr. DeSalvo the following morning, Thursday, March 18, and advised him that he had been presumptious in sending out a purported fixture telex because there were inaccuracies in the telex, and many details had yet to be agreed upon. Mr. Theodoracopulos said he instructed Mr. DeSalvo that he did not understand the deletions in the mobiltime form and that he wanted Mr. DeSalvo to prepare a *pro forma* of the charterparty and send it along. (R. 218-220)

Mr. DeSalvo did not recall specifically what had been discussed with Mr. Theodoracopulos, but he had no recollection that Mr. Theodoracopulos sounded angry or that Mr. Theodoracopulos protested the fact that the fixture telex had been sent out, nor did he dispute any of the terms in the fixture telex. Mr. DeSalvo remembered that he asked Mr. Theodoracopulos if he received the fixture telex, and he recalled only that they discussed generally what Mr. Theodoracopulos wanted to do with the Oswego Reliance, discussing the market in general with the eye to possible speculative subcharters. (R. 139, 141)

According to Mr. DeSalvo, he began drawing up the form himself, attempting to work out the specific drydocking clause which had been left for further agreement. Also on the morning of March 18, Mr. DeSalvo called Mr. Germano to obtain information he would need in filling out a *pro forma* time charter form. This was a matter of standard office procedure for Mr. DeSalvo, and it was meant only to give the parties a chance to examine a completed document and make certain that there are no later changes which they might wish to include. (R. 36, 124-25) In the conversation with Mr. Germano, Mr. DeSalvo was informed that owners would require drydocking in Spain, Portugal or Japan, because of contractual arrangements with shipyards there. Mr. DeSalvo did not remember whether he informed Mr. Theodoracopulos of this proposed clause by telephone on Thursday, the 18th, but he did include it in his draft of the *pro forma* charter. (R. 140-141, App. 65a, p. 23) Sometime in the morning of Thursday, March 18, 1971, Mr. DeSalvo noticed by way of trade publications that Chevron, Standard Oil Company of California, desired a vessel of approximately OSWEGO RELIANCE specifications for a voyage charter from the Persian Gulf to South Africa. Mr. DeSalvo telephoned Mr. Theodoracopulos at approximately 11:00 that morning to request his authority to see if the vessel could be subchartered to Chevron. Mr. DeSalvo clearly testified that he received specific authority from Mr. Theodoracopulos over the telephone to attempt to negotiate a subcharter. (R. 37-39, 145 App. 65a, p. 24)

Mr. Theodoracopulos admitted that Mr. DeSalvo advised him of a possibility of chartering the OSWEGO RELIANCE to Chevron. (R. 222-223)

Pursuant to the authorization which had been received from Mr. Theodoracopulos, Poten contacted the chartering department at Chevron and told them they could offer the OSWEGO RELIANCE and told the Chevron people the size

and description of the ship. Poten then told Chevron that they had been authorized to offer the vessel at world-scale 160. Mr. DeSalvo's testimony was very clear that he had received his instructions as to price from Mr. Theodoracopulos. (R. 145-146) Chevron responded with a request for further details of the ship and also with the condition that they would not accept the offer unless the vessel was entered in Tovalop. Mr. DeSalvo immediately telephoned Mr. Theodoracopulos and told him that Chevron would not accept the offer unless the vessel was entered in Tovalop. Mr. Theodoracopulos instructed Mr. DeSalvo to find out if the vessel was. Mr. DeSalvo then called Mr. Germano and asked him and was told that Bethlehem Steel was self-insured and had not done anything about enrolling its vessels in Tovalop. Mr. DeSalvo replied to Mr. Germano that he thought owners would have to enroll the vessels with Tovalop because more and more companies were demanding that vessels be so insured and he thought that this would lead to a great difficulty for Mr. Theodoracopulos to subcharter the vessel. Mr. Germano said that he would check with their insurance people and top management, and he would get back to him. (R. 40-41, App. 65a, p. 27-28)

Mr. DeSalvo recalled discussing this matter further with Mr. Theodoracopulos. Mr. Theodoracopulos asked Mr. DeSalvo to explain to owners that the vessel would almost have to be a member of Tovalop in order for it to be usable to him, and that Mr. DeSalvo should try to impress this fact upon the owners. (65a p. 28)

March 19, 1971

On Friday, the 19th, Mr. DeSalvo continued working on the *pro forma* charterparty, completed it toward the end of the day and mailed it to both Mr. Theodoracopulos and Mr. Germano. (App. 65a, p. 32)

Also on Friday, March 19, Mr. DeSalvo discussed the Tovalop issue with Mr. Germano again, and was informed that the matter had been referred to higher management in London, and that an answer would not be received until the following Monday. (App. 65a, p. 32) Mr. Theodoracopulos testified that he discussed the issue of Tovalop with Mr. DeSalvo on Friday, and was informed by him that Interocean would have its response to the enrollment of its fleet in Tovalop the following Monday. (R. 225-226)

March 22, 1971

On Monday, March 22, 1971, Mr. DeSalvo was informed during a telephone conversation with Mr. Germano that Interocean had agreed to join Tovalop, and was going to make the necessary application to enroll all its vessels in Tovalop that day by cable. Mr. DeSalvo communicated this information to Mr. Theodoracopulos. (App. 65a, p. 33)

Also on Monday, March 22, Mr. Theodoracopulos received in the mail the *pro forma* charterparty which Mr. DeSalvo had prepared. Mr. Theodoracopulos testified he gave it a cursory review. He testified that he called Mr. DeSalvo later that day, and said certain terms in the *pro forma* were unacceptable. The terms had to do with the vessel's trading limits, payment of hire, and drydocking. (R. 227) DeSalvo's notes show that Theodoracopulos only asked DeSalvo to try to persuade Interocean to expand the delivery range and trading limits and that Theodoracopulos would "prefer" semimonthly hire payments. (App. 61a, p. 2)

March 23, 1971

On Tuesday, March 23, 1971, Mr. DeSalvo received confirmation from Mr. Germano that Interocean's fleet had been enrolled in Tovalop. Mr. Germano told Mr. DeSalvo

to inform Mr. Theodoracopulos that charterers were to pay the Tovalop premium for the OSWEGO RELIANCE.

Mr. DeSalvo, the same day, called Mr. Theodoracopulos and conveyed to him the information that the owners had agreed to enroll the vessel in Tovalop, provided that charterers would pay the premium for the OSWEGO RELIANCE. This proposal was rejected by Mr. Theodoracopulos who stated that Tovalop was an item for the owner's account. During the course of the conversation, Mr. DeSalvo advised Mr. Theodoracopulos that Interocean would agree to add the Red Sea to the vessel's delivery range, provided there was no extra deviation. They would not agree to trading limits which included Yugoslavia, etc. (R. 227-229)

At approximately noon on March 23, Mr. Theodoracopulos departed for vacation, and Mr. Spears entered the negotiations. The negotiations concerned the payment of Tovalop premiums and the drydocking clause. Toward the end of the day, Spears gave DeSalvo wording for a drydock clause which Spears thought acceptable. The clause was to be passed on to Interocean for their reply. (R. 229, 259, 263) The clause which Spears proposed was reflected in DeSalvo's contemporaneous notes: (App. 61a)

> "Charterer will do all possible to position the vessel for 15 days in the U. K., Med., or Far East so that drydocking can be accomplished between October 15/December 15, 1971."

March 24, 1971

On Wednesday morning, March 24, 1971, Spears called DeSalvo at 9:00 in the morning. Spears asked DeSalvo if he had conveyed the proposed drydocking clause to Germano. DeSalvo said he had not because he received it after business hours the previous day. Spears then told DeSalvo not to pass the drydocking clause along to Inter-

ocean. Spears then informed DeSalvo that he was to inform owners that the deal was finished and that there was no agreement to charter the Oswego Reliance. (R 265, App. 65a, p. 44) This was confirmed by telex the same morning. (App. 19a)

Later in the morning of March 24, DeSalvo called Spears and informed him that Interocean would agree to pay the premium for Tovalop and would accept his proposal for a drydocking clause. Spears reiterated that he felt the negotiations had concluded without a binding agreement. (R. 51-52)

Later in the afternoon, Poten received a telex from Interocean which was to be transmitted to National. (App. 20a-21a)

That same day, DeSalvo prepared a draft form for the guarantee to be executed by National. This guarantee was prepared on the basis of similar guarantees which DeSalvo had drafted in the past for National. (R. 52-53) The form of the guarantee is found at App. 67a. The guarantee had not been prepared at the time the *pro forma* charterparty was prepared (March 19, 1971) because the guarantee was to be in the form of a separate agreement. (R. 123, 171-172)

On the same day, DeSalvo also prepared a final form of the charterparty for execution by Interocean. This charterparty contained, in addition to the terms mentioned in the original *pro forma* charterparty (of March 19, 1971) the following changes: (App. 75a)

Clause 3a was changed to provide for delivery at "a Persian Gulf port excluding Fao and Abadan" to which the words were added "or Red Sea at Charterer's option, provided no extra deviation involved."

In Clause 11, the drydocking provision originally proposed by Interocean in the *pro forn* was deleted and the clause suggested by Mr. Spears wa inserted.

A further clause, No. 38, was also added which provided that the owner will register the vessel in Tovalop with all costs pertaining thereto to be for owners' account.

DeSalvo testified to significant events in the market which were not a part of the negotiations carried out on March 24, 1971. DeSalvo testified clearly that by the morning of March 24, the charter market had started to fall. This meant that the OSWEGO RELIANCE, which had been chartered by Hellenic as a speculative venture, might not be profitable as the subcharter market had declined. (R. 51)

Theodoracopulos, who was not in New York on March 24, denied that the market had started to fall. (R. 241) It is significant to note, however, that Spears, the President of National, testified clearly that the market was starting to fall.

Spears testified: (R. 263-264)

> "A. Well, I sat around the office. I waited for a while and I became—I was starting to become quite jittery, frankly, because there was a certain weakness in the spot market in the Persian Gulf."

A little later in cross-examination, Spears indicated also that the primary concern on his mind was not the OSWEGO RELIANCE charter, which he presumed to have been fixed, but he was concerned about the subcharter of the vessel in the Persian Gulf. Referring to the anticipated subcharter to Chevron, Spears testified: (R. 310)

> "We had not concluded this charter. We had to conclude the subcharter and give instructions to the Captain by the end of that week, when it appeared that the spot market in the Persian Gulf showed a weakness."

March 25, 1971

Interocean executed the charterparty prepared the day before, and returned it to DeSalvo. DeSalvo then sent the executed charterparty by hand to National for their execution. DeSalvo explained that the reason he sent the executed copy by hand was because there were obviously problems with the transaction by March 25. He explained that the earlier *pro forma* draft (March 19) had been mailed because at that time there were no problems in the negotiations. (R. 177) The charterparty was, of course, never executed by National and Hellenic.

Also on March 25, Poten received a telex from National confirming the cancellation. (App. 22a)

The Expert Testimony

DeSalvo also testified as an expert in the chartering of vessels. In addition, therefore, to his testimony as to what actually occurred in the course of the OSWEGO NEGOTIATIONS, DeSalvo was also asked to comment from time to time as to his opinion of the custom and practice of ships' brokers, and also to explain the propriety, when viewed against this custom and practice, the various aspects of the OSWEGO RELIANCE negotiations. DeSalvo testified that as a broker it was his obligation to pass negotiations between the parties back and forth. He testified that the parties never asked to be put into direct contact with one another. DeSalvo testified, however, that he did not consider himself to be the agent of National and Hellenic. What he meant by this, obviously, is that he did not consider himself their agent to consummate a fixture. He explained this as meaning that it was up to the principals to agree to the fixture, and that all he did was pass their communications, which indicated an agreement, back and forth among the principals. (R. 29, 151-152) This view

of DeSalvo's authority was conceded in large part by charterer's counsel. During a colloquy with the Court, Mr. Gilchrist stated: (R. 9)

> Mr. Gilchrist: "... We are dealing, as he said with one broker, purporting to act for both parties to the negotiations.
>
> The Court: "That is not an unusual situation, is it?"
>
> Mr. Gilchrist: "It happens."
>
> The Court: "Frequently, doesn't it?"
>
> Mr. Gilchrist: "It is not uncommon. Many times both sides have their own broker, but it is perfectly normal for one broker to act for both."
>
> The Court: "Nothing sinister in it. By that I mean, it is a custom of the trade."
>
> Mr. Gilchrist: "Nothing sinister about that."

DeSalvo also testified that by the terms of the oral agreement, as reflected in his notes, and also as stated in the fixture telex, the time (November) and duration (15 days) of the drydocking of the vessel had been specifically agreed to. Both parties had agreed to leave the specific wording of the drydocking clause to later negotiations. DeSalvo testified that a vessel is normally drydocked once a year for normal overhaul and bottom painting. It is also not unusual for a hull inspection to be required by insurance underwriters. The location of the drydocking port is also determined after the vessel is in operation, under charterer's orders, so that there will be some estimation of the vessel's positioning at the time drydocking is required. Drydocking is an item for the owner's account. The vessel is off hire during the time she is drydocked, and if the vessel has to deviate from its normal trading routes to reach the drydocking port, the deviation time and expenses are also for the owner's account. (R. 42-45, 141, 176)

Pursuant to this normal practice of working out the specific drydock clause after the vessel is fixed, DeSalvo

received Interocean's proposals for drydocking which included the requirement that the vessel drydock in Iberia or Japan. This was passed along to charterers who initially objected to the location of the drydocking, but, on March 24, themselves proposed a clause accepting drydocking in Iberia and Japan which they felt would be acceptable. This clause was subsequently accepted by owners. This indicates clearly that the established pattern that the drydocking would be agreed to as a result of subsequent negotiations was met in this case. (R. 42-45)

DeSalvo also explained as to the meaning of the expression "mobiltime sub details". DeSalvo stated that the mobiltime charter was proposed at his suggestion primarily because this term was familiar to Mr. Theodoracopulos, having been used by National on prior occasions. (R. 113) DeSalvo stated that "sub details" was standard terminology in the shipping trade. The expression had the meaning of filling in the blanks, in other words, of completing the charterparty form so that the form coincides with the terms of the fixture. Mr. DeSalvo stated that the charterparty forms for tankers are usually drafted by major oil companies to suit their own purposes, and that it is necessary to conform these drafts to the requirements, as outlined in the agreement, of individual charterers and owners. DeSalvo stated that the broker did not have authority to make material changes in the charterparty form, but was to conform the charterparty to the agreement. (R. 102-106) DeSalvo's testimony was very clear that "sub details" did not have a meaning of "subject to agreement to all of the terms in the charterparty form." DeSalvo testified that within the custom of the trade he would also delete clauses in the form charter on which there had not been a specific agreement by the parties. (R. 109-110; App. 65a, p. 21-23)

DeSalvo was also asked to explain the meaning and significance of Tovalop. Tovalop did not appear in the negotiations between the parties prior to the actual fixture of the vessel. Tovalop was first mentioned on March 18

(the day after the fixture) when it was inquired about by the chartering people at Chevron to whom the OSWEGO RELIANCE had been offered on subcharter. Tovalop was a voluntary scheme formed by tanker owners to indemnify them for liabilities to national governments occasioned by oil polluition. DeSalvo testified that in 1971, Tovalop was comparatively new and that there had as yet been no custom as to who would pay Tovalop premiums. (R. 40) DeSalvo testified that there was no industry custom as of that time for a requirement that a vessel be enrolled in Tovalop for it to be chartered to major oil companies. According to DeSalvo, some of the major oil companies did require a vessel to be enrolled in Tovalop before they would require it, but this was not true of all the major oil companies. (R. 147-148)

The next expert to testify for owners was Hans Proeller. Mr. Proeller had been for 12 years the chartering manager of Fritzen-Halcyon Lines. Mr. Proeller testified that there is a practice concerning drydocking during a time charter. The time required for the drydocking is to be for the owners' account and expense. If there were a deviation to reach the drydocking port, the deviation would also be a matter for the owners' expense. A charterer is held harmless for any extra time that a ship must need to get to a drydocking port. (R. 194)

The next witness was Joseph R. Kelley, Jr. Mr. Kelley was an attorney for the Bethlehem Steel Corporation and an officer in several of Bethlehem's subsidiary shipowning companies. Mr. Kelley testified as to the insurance coverage of the Bethlehem fleet, of which the Interocean vessels were a part. Bethlehem owned, through its subsidiaries, a fleet of 19 vessels. All of the vessels were self insured in a Bethlehem program. Mr. Kelley testified that in the two and one-half years he had been with Bethlehem, none of their vessels had been seized in connection with a P & I claim. (R. 198-199) Mr. Kelley testified further that

Bethlehem had local agents in ports all over the world who could handle P & I matters through the self insurance program. (R. 200-201)

The last expert called by owners was Mr. Willy Gorrissen. Mr. Gorrissen is a principal in the shipbrokerage firm of Jones & Gorrissen. He stated that he had been in the shipping business for about 45 years, not always as a ship broker, but at times as a principal. He said he had been working exclusively in the tanker brokerage market for the last 12 to 15 years. He stated that he had had business with both Bethlehem and Mr. Theodoracopulos. Mr. Gorrissen first testified as to Tovalop as it existed in 1971. He said the program was originally organized in 1969, but that most companies did not enroll until sometime in 1971. During 1971 there were several major oil companies that did not belong and did not insist that owners from who they chartered be members of Tovalop. There were some oil companies by this time which did insist that independent owners be members of Tovalop. The custom in dealing with the major oil companies was that the owner paid the Tovalop premium. (R. 316-319)

Mr. Gorrissen was asked to discuss the significance of the phrase in the fixture telex, "SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER NOTICES." Mr. Gorrissen stated that the language was clear to him as a ship broker. He said that the drydocking clause would be worked out to the satisfaction of both parties covering where and when the ship would to drydock. He stated that the custom in the industry is for a fixture to be concluded without settling the drydocking clause. The broker quite often puts his wording in the charterparty, detailing what he thinks is beneficial to both parties. This is done after the fixture is concluded, and is not considered a difficult clause. He said it is not a major feature of the charterparty. (R. 319)

Mr. Gorrissen further testified that drydocking in November would not be a substantial burden on a charterer because it was not true that the winter months were the most profitable for chartering. He did not think it was significant for the charter to provide for November drydocking in Spain, Portugal & Japan because the Persian Gulf to Japan and the Persian Gulf to the United Kingdom and North Europe are the principal trading routes for tankers the size of the OMEGA RELIANCE. In his opinion, it would be fairly easy for an owner to charter a vessel which would place the vessel in proximity either to Japan or the Iberian Peninsula at the time the drydocking was to take place. Mr. Gorrissen was of the firm opinion that the decision of whether to drydock on the Continent or Japan was completely up to the charterers and, therefore, along either of these major trading routes, they could fix a subcharter which would place the vessel near the drydocking port. (R. 321-322) When asked to interpret the specific clause concerning drydocking in the *pro forma* charterparty, Mr. Gorrissen said that while he had never seen that specific language before, he had seen clauses similar to that. He said his interpretation of the clause would be that the charterers would have the option of choosing whether the vessel would be drydocked in Spain, Portugal or Japan. This would not be a burden on the charterer because the Persian Gulf to Japan or the Persian Gulf to North Europe were principal trading routes. He stated that even if the vessel had been on a prior voyage to the Caribbean that a cargo could be secured from the Caribbean to Europe. He said that world scale rates took into account the fact that the charterer would have a certain number of ballast days. (R. 325-327)

Respondent's first expert was Jack Porvancher. Mr. Porvancher is President of Great Eastern Associates, a marine insurance and general average adjusting firm in New York City. On cross examination Mr. Porvancher conceded, however, that a charterer can purchase his own

P & I assurance. He testified that there was an honest difference of opinion as to whether or not this type of insurance would entail the posting of security to free the vessel from seizure, in the manner which was common for P & I insurance. (R. 73-74) He conceded that there was nothing unusual about a large company self-insuring its fleet. He stated that the vessel owned by Mobil Oil Company were self-insured, at least for a time, and he conceded that he knew the Bethlehem fleet was self-insured. (R. 75-76)

Respondent's next expert was Mr. Arthur E. Ferris. Mr. Ferris was an experienced chartering manager for a number of years in New York City.

On cross-examination, Mr. Ferris conceded that according to Clause 12 of the *pro forma* charterparty, insurance was for the account of the owners. He also stated that he was familiar with the fact that Bethlehem was a self-insurer. He conceded that Bethlehem had a good reputation for solvency and had no doubt that Bethlehem had the capacity, financially and operationally, to run its own self-insurance program. As to drydocking, Mr. Ferris conceded that if a vessel was to be drydocked in Lisbon, for example, in November, that it would be entirely practical to have the vessel trading from the Persian Gulf to the United Kingdom or Northern Europe in October. The vessel could then easily divert in ballast in Lisbon for the drydocking. (R. 348-349)

Mr. Ferris stated that it was customary in the trade for both owners and charterers to take notes on the offers and counteroffers that are passed back and forth prior to the fixture. He also stated that if you receive a telex, it should be read over very carefully and that if there is disagreement as to the terms of the telex, a reply telex should be sent immediately. If you are unable to send a telex because of the lateness of the hour, then it is good practice to send a telex criticizing the fixture immediately the following morning. (R. 350-351)

The Opinion Below

The Court below felt that its mandate on remand was to determine through a full trial whether in all the conversations between the parties there was a meeting of the minds which thereafter was memorialized in a fixture letter by which National and Hellenic were bound.

The Court, finding most disputed items in accordance with shipowner's testimony, concluded that the overwhelming evidence, both testimonial and documentary, was that a charterparty agreement had been entered into by the parties. The Court found the essential terms were contained in the fixture letters which bound both Hellenic and National, and that the guarantee set forth in the fixture letter signed by the broker was a sufficient memorandum to satisfy the New York Statute of Frauds (N. Y. General Obligations Law, § 5-701(2) (1964)). (App. 37a-38a)

The Court also made an important ruling as to the general credibility of the witnesses before it. The Court found the testimony of DeSalvo to be credible. His testimony was consistent and was supported by his contemporaneous notes as well as a sworn statement which had been taken of him on April 6, 1971 when the events were fresh in his mind. The Court did not believe the testimony of Theodoracopulos and Spears. This was based on the fact that neither Spears nor Theodoracopulos had any handwritten notes or contemporaneous diary entries relating to the numerous communications and telephone calls which were had as to this and other business deals which were estimated by Theodoracopulos to be about 500 calls a year to DeSalvo alone. (R. 234) Theodoracopulos, in fact, testified that he had made notes about the Oswego Reliance, but had thrown them out even though the matter had been referred by him to counsel prior to his destruction of his notes. (R. 235-237)

The most recent authority in this Circuit, *Gemini Navigation, Inc.* v. *Philipp Brothers,* No. 962, Sept. Term 1973

(2 Cir., July 1, 1974) holds that a trial judge's rulings based on live testimony should not be disturbed unless they are clearly erroneous. In cases involving oral fixtures, the "clearly erroneous" rule is always applied. *Orient Mid-East Lines* v. *Albert E. Bowen, Jr.*, 458 F.2d 572, 574 (2 Cir., 1972); *Gardner* v. *The Calvert*, 253 F.2d 395, 399 (3 Cir., 1958).

ARGUMENT

POINT I

An agreement to charter the OSWEGO RELIANCE was made and the parties are bound by it.

A. The fixture note is conclusive evidence of an agreement, even though some terms were left to be decided later or misstated.

On March 17, 1971, in the late afternoon, an agreement was reached between petitioner and respondent through their mutually authorized representative, Poten and Partners, for the charter of the OSWEGO RELIANCE. The drydocking clause was left for subsequent agreement, although the time for the drydocking and duration were agreed upon.

This procedure was clearly approved by the United States Court of Appeals for the Second Circuit in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (2 Cir., 1942), where the Court affirmed the District Court's findings that a charter had been agreed to even though the fixture slip was by no means complete. The Court stated at page 980:

> "On March 15, 1940, Rothchild, of the firm of Blidberg Rothchild Co. Inc., and Gordon, acting on behalf of Potter & Gordon, Inc., agreed upon a charter and closed by Gordon, executing and delivering to Rothchild a fixture slip which is the

usual trade practice, indicating the conclusion of charter negotiations in the trade of ship brokerage. All the material terms of the bargain are set forth in the fixture slip excepting demurrage, dispatch, and the date of the commencement of the charter term which all had been agreed on but were omitted by an oversight. A number of the terms, including the War Risks Clause of 1937, were fixed by the incorporation of a reference to an earlier charter of the steamer 'Norbryn.' Gordon acted with authority.

Thereafter, respondent refused to sign the charter but instead repudiated it.''

Another case upholding the validity of a fixture letter is *Dover Steamship Company* v. *Summit Industrial Corporation,* 148 F. Supp. 206 (SDNY, 1957).

In *Gardner* v. *The Calvert,* 253 F.2d 395, 398-399 (3rd Cir., 1958), the Court upheld an oral fixture despite the fact that the charter form prepared subsequently differed in several respects from the oral agreement and contained blank spaces.

In *Orient Mid-East Lines* v. *Albert E. Bowen, Inc.,* 458 F.2d 572, 574 (2 Cir., 1972), this Court found a binding oral fixture even though the fixture memorandum prepared by the broker contained a material term not previously agreed to—that being provision for an on deck stowage.*

The most recent authority in this Circuit is *Christman* v. *Maristella Compania Naviera,* 349 F.Supp. 845 (SDNY, 1972), affirmed without opinion, 468 F.2d 620. In this case, the Court upheld the validity of an oral fixture which differed from the terms of the fixture cable which, in turn,

---

* On deck stowage in absence of an agreement can be held a deviation. *Encyclopedia Britannica* v. *Hong Kong Producer,* 422 F.2d 7 (2 Cir., 1969).

differed from the form of the charterparty prepared by the broker. The Court stated at p. 854:

> "As noted, Captain Maris, at least until October 5th, considered that the vessel had been fixed. The occurrence of minor variances between oral and cable agreements and the fixture letter are not unusual in the shipbroking industry and the same situation exists with respect to variances between the charterparty as written and signed and the actual fixture. Under such conditions, the actual fixture controls and it is usual to settle by agreement, by arbitration, or if necessary by an equitable action for reformation of the instrument, any issues which may arise as a result of this type of variance, if indeed the variance is found to be material to the bargain. Since the fixture was made orally and was binding on September 25th, the written document drawn up later was without import, except as a memorandum of the terms which had been agreed to orally with respect to the fixture."

B. The variations between the oral agreement and fixture Telex were immaterial clerical errors and were not considered important by charters.

The oral agreement reached on March 17, 1971 was reflected in the contemporaneous notes of Mr. DeSalvo. The fixture did contain several minor clerical errors of no significance to the bargain. Specifically, the phrase "mobiltime sub details" was omitted from the fixture. In the fixture, the expression "MOBILTIME EXCLUDING CLAUSE 9, 12AII, 12BII, 12BIII" appears.

The testimony was clear that the mobiltime form would be used and that details had to be filled in. Mr. DeSalvo said he could not explain the omission of the phrase. (R. 111) The omission was an error, but did not indicate a basic disagreement over the terms. *Christman* v. *Mari-*

stella Compania Naviera, supra; Orient Mid-East Lines v. *Albert E. Bowen, Inc., supra.*

Secondly, Mr. DeSalvo had recorded in his notes "Trading world-wide within Institute Warranty Limits excluding China, North Vietnam, North Korea, Cuba, Israel and all other Communist countries." The fixture read, "Trading World Wide Within IWL Excluding Communist Communist Controlled China, North Vietnam, North Korea, Cuba."

This also was considered immaterial by the Court below and clearly is a typographical error. The expression "Communist Communist" shows merely a typographical error. Mr. DeSalvo probably meant "Communist Countries". The omission of Israel was a similar error. Mr. DeSalvo testified clearly that owners' offer was given to Mr. Theodoracopulos. (R. 34) Mr. Theodoracopulos admitted that he received the information contained in Mr. DeSalvo's notes. (R. 211)

This again is a broker's error which does not evidence a lack of agreement. *Christman* v. *Maristella Compania Naviera, supra; Orient Mid-East Lines* v. *Albert E. Bowen, Inc., supra.*

Despite the self-serving testimony of Mr. Theodoracopulos that he protested the issuance of the fixture telex on Thursday, March 18, the Court found as a fact that no protest was made. (App. 43a) Mr. DeSalvo who kept careful notes throughout the negotiations (App. 61a) and whose notes are conceded to be accurate by Mr. Theodoracopulos (R. 211), recorded no protest against the fixture. Mr. Theodoracopulos, of course, had destroyed his notes after the dispute was referred to his attorney, and there was evidence that his memory may have been incomplete. (R. 234) Mr. DeSalvo further testified that Mr. Theodoracopulos never protested the fixture telex or its terms, but discussed only the general market in the telephone call. (R. 35, 139, 141)

The evidence revealed that National's telex machine was working on both March 17 and 18. Spears was experienced in the operation of a sophisticated computer, and the Court clearly did not believe that Spears could not operate a telex. (R. 220-221) There was evidence in the record that there was an attendant on duty at the telex machine. (R. 250) From all this, the Court could conclude that Mr. Theodoracopulos accepted the fixture, as confirming the oral agreement, even though it contained two clerical errors.

Mr. Ferris, a chartering expert, offered by the respondent, also testified that it is good practice to keep contemporaneous notes (R. 351) and that if you received a telex with which you disagree to respond promptly by telex. (R. 351)

> "Q. When you receive a telex, isn't it good practice to read it over carefully? A. Definitely.
>
> • • •
>
> Q. Is it good practice when you get a message to acknowledge it and, if you disagree with it, to state wherein you disagree? A. That would really depend on the circumstances. If, for example, it were I who was in the office at that time, I don't operate a telex and if I had nobody to give it to and tried unsuccessfully to communicate I would let it go to the next morning.
>
> Q. Then you would send a telex the next morning, wouldn't you? A. I would."

A case dealing with the retention of a memorandum without protesting terms which revealed a variation from the oral fixture is *United States Navigation Co.* v. *Black Diamond Lines,* 124 F.2d 508 (2 Cir., 1942), in which the oral agreement was upheld despite execution of a charterparty differing therefrom. *Dalzell* v. *The St. Nicholas,* 109 F. Supp. 595 (SDNY, 1951) is in accord.

POINT II

The material terms of the fixture were agreed to and the open drydocking clause and Mobiltime details were not so material as to frustrate the purpose of the charter.

Charterers have laid great stress on the negotiations following the fixture which concerned the drydocking clause. In fact, these subsequent negotiations resulted in an agreed drydocking clause within the space of only three days—March 22, 1971 (Monday) when the pro forma charter containing Interocean's proposal was received by Theodoracopulos and March 24, 1971 (Wednesday) when Interocean accepted Spears' proposed drydocking clause.

The principal contention here is that subsequent negotiations were perfectly consistent with finding an agreement as to all material terms. The Court below so held: (App. 57a-58a) on the following authority: *V'Saske* v. *Barwich*, 404 F.2d 495 (2 Cir. 1968); *Williston on Contracts*, 3rd Ed., Sec. 48 p. 157; *Aaby* v. *States Marine Corp.*, *supra.*

The *Aaby* case relied upon by the Court below was cited in *Dover Steamship Company* v. *Summit Industrial Corporation,* 148 F. Supp. 206 (SDNY, 1957) to support the same proposition: that a variation from the initial fixture must frustrate the purpose of the charter before it will void the agreement.

Owners' argument has two prongs. First, it was not unusual for the drydocking clause to be left partially open. Theodoracopulos conceded this. (R. 246) DeSalvo testified that this was a term which could be agreed upon later, and a clause for which he had some authority to draft preliminarily. (R. 125) Willie Gorrissen was of the firm opinion that drydocking was a minor clause to be worked out as the vessel was traded under the charter. Gorrissen also conceded that this was a drafting point on which the broker had authority to propose a solution. (R. 319)

Secondly, the subsequent proposal by Interocean that the vessel be drydocked in the Iberian Peninsula or Japan did not work such a hardship on charterers as to frustrate the venture. Gorrissen testified that Spain and Portugal and Japan lay on the principal tanker trade routes which were the Persian Gulf-Northern Europe and Persian Gulf-Japan. (R. 326, 331) Ferris conceded this. (R. 348) The vessel could be traded along either route at charterer's choice. (R. 323-324)

The expenses involved when the vessel had to deviate for the drydocking port were for owners' accounts, and the vessel was off-hire. (R. 42-45, 194, 327) The requirement for a 15-day November drydocking was a part of the bargain from the outset (App. 61a), and neither Theodoracopulos nor Spears objected to it prior to the fixture. (R. 34)

The objection that the drydocking clause frustrated the purpose of the venture is clearly an afterthought. Spears, National's President, strongly implied that the fixture contained all the terms which seemed material to him: (R. 225)

> The Court: "So that you had no complaint then to make on the terms of the fixture with relation to either speed or bunker consumption?"
>
> The Witness: "In fact, I had no complaint at all . . ."

As to reference in the oral agreement to "mobiltime sub details", this does not indicate a lack of basic agreement. DeSalvo testified that this meant placing the agreed terms in a printed charter form and eliminating inapplicable terms. (R. 102; App. 65a, p. 21)

The principal evidence of whether or not an agreement exists is the intention of the parties. The Court found that National had accepted the fixture expressly, and this was supported in the Record. (R. 28; App. 65a, pp. 15-16) The Court found further evidence of acceptance in National's attempt to subcharter the vessel. (App. 59a, 65a, p. 24; R. 37-39, 145)

National's reliance upon *Orient Mid-East Great Lakes Service* v. *International Export Line,* 315 F.2d 519 (4th Cir., 1963) is misplaced. For one thing, the decision rested on the fact that the broker never sent out a fixture telex. *Id.,* p. 523. The Court also found that *both* parties felt omitted charter terms to be significant. *Id.,* pp. 522-523 (emphasis in original). In this case, at most only one party felt drydocking and sub details significant, and the Court found a fact that neither party actually felt the terms significant. Finally, the decision is not governing in this Circuit because of such later contrary authority as *Orient Mid-East Lines* v. *Albert E. Bowen, Jr., supra; Christman* v. *Maristella Compania Naviera, supra,* and older authority such as *Kulukundis* v. *Amtorg Shipping, supra.*

The *Christman* case, moreover, recognizes the broker's authority in a "sub details" case to fill in the printed form at p. 853:

> "An agent has express authority or implied authority to make variations on matters not material to the bargain, and to place any reasonable construction on the specific instructions of his principal."

Later, in discussing a drafting error of the broker, etc. The Court held at p. 855:

> "Item 4—relates to an entirely gratuitous provision which had been inserted in the charter party providing that the payment of demurrage or dispatch in discharging ports is for consignee's account. There is no explanation how this material came into the charter party since it was not discussed in any of the negotiations . . . This is not a totally unheard of provision, and is customary and represents a type of minor matter in which an agent has at least some implied authority to on his own judgment and discretion and act in accordance therewith."

POINT III

Trading limits, delivery range, insurance, Tovalop and speed and performance were either agreed to as confirmed by the oral fixture or were not part of the original bargain at all.

The discussion under this section will be divided into each category for convenience.

A. Trading limits and delivery range.

DeSalvo's notes recorded trading limits as follows (App. 61a):

> "trading worldwide within Institute's Warranty Limits excluding China, North Vietnam, North Korea, Cuba, Israel and all other communist countries."

These were the terms Germano proposed. The term was read to Theodoracopulos who admitted that he received it. (R. 211-213) He did not object to the trading limits. (R.35) In the fixture telex, DeSalvo erroneously described the trading limits as follows (App. 42a):

> "TRADING WORLDWIDE WITHIN IWL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM NOR KOREA CUBA"

Theodoracopulos admitted receiving the fixture telex and reading it. (R. 218) There was substantial evidence from DeSalvo's notes and testimony that Theodoracopulos did not protest the error and may not even have noticed it. (App. 61a, R. 35, 139, 141)

In the first pro forma charterparty of March 19, 1971, DeSalvo, using his notes partially corrected the error, but left out Israel. Theodoracopulos received the pro forma charter on March 22, 1971. He read it hurriedly. Instead

of protesting the charter as inaccurate, DeSalvo's notes show that Theodoracopulos asked simply: (61a)

> "Trading—try to get O.K. in Yugo., Bulgaria, Rumania, E. Germany."

This was clearly a proposal for an amendment not a correction of an error. The words "try get" reflect this. The Record reveals that Theodoracopulos knew what the original trading limits were, and the Court so found. (App. 45a)

The drafting errors did not alter the terms of the original bargain. *Christman* v. *Maristella Compania Naviera, supra.*

As to delivery range, the original notes of DeSalvo state in translation:

> "Delivery one safe Persian Gulf port excluding Fao and Abadan." (App. 61a)

The fixture telex states:

> "DELIVERY 1 REDELIVERY PG EXCLUDING FAO AND ABADAN." (App. 42a)

That as an afterthought, Theodoracopulos on March 22, 1971, requested delivery in the Red Sea does not mean that a bargain had not been struck. Red Sea was not in the fixture, and the Court found that Theodoracopulos did not protest after receiving the fixture telex on March 17, 1971.

B. Insurance.

Charterers argue that the fixture gave no warrant for the deletion of Clause 23 of the mobiltime form regarding P & I entry. Secondly, they argue that charterers could not have known that Bethlehem self-insured its fleet. Thirdly, they argued that self-insurance would not be as good as P & I coverage.

This attack is specious for several reasons. First, insurance was not a part of the bargain on March 17, 1971. Theodoracopulos had never inquired about it. The charter per Clause 12 placed insurance as a matter for owners' account. (App. 15a; R. 348) Charterers' expert conceded that charterers could obtain insurance of their own in the market, though he argued it might not be as good as owners' insurance. Provancher conceded also that charterers' insurance might provide for posting security. (R. 73-74) If the contract placed insurance on owners' account, charterers could charge owners for the premiums.

Secondly, the evidence was preponderant that Bethlehem's self-insurance was adequate. Charterers' expert, Ferris, conceded that Bethlehem had the resources, the reputation for having the resources, and the capacity to self-insure. While Provancher testified that it would be impossible for an owner to operate a vessel without P & I coverage (R. 59), he did admit that Bethlehem and Mobil were doing it. (R. 73-74, 349) Mr. Kelley testified that Bethlehem had never had one of its 19 vessels arrested and that its self-insurance program had representatives in all major ports who could post security. (R. 199-200) There is abundant evidence that the OSWEGO RELIANCE had adequate insurance coverage.

Finally, charterers could not rely on the assumption that Bethlehem had P & I insurance. Both charterers' experts conceded that some larger corporations self-insured, among them Mobil Oil Corporation. Bethlehem's self-insurance program was not a secret. Both Theodoracopulos and Spears had long experience in shipping, and the Court's conclusion that they knew that their was no P & I insurance is supported by credible evidence. This Court should not disturb the Court's observation of the witnesses' demeanor.

C. Tovalop.

Tovalop is a fairly simple point. Tovalop is not mentioned in the printed mobiltime form. (R. 311) There was

no custom in the trade requiring Tovalop. (R. 40, 317) Even respondent's expert conceded only 65% of the owners enrolled their vessels in Tovalop in March 1971. (R. 66-67)

Tovalop never appeared in the negotiations leading up to the bargain. Even Theodoracopulos admitted that Tovalop did not occur to him until Chevron inquired about it. (R. 224)

The Court found as a fact that the negotiations following the fixture were aimed at adding to an already firm agreement and that such negotiations are common. 1 *Corbin on Contracts* Sec. 85; 1 *Williston on Contracts* Sec. 79. (App. 59a-60a)

There was a substantial conflict in the record as to whether the vessel could be traded profitably without Tovalop. DeSalvo and Gorrissen testified that it could be traded profitably, and Mr. Ferris agreed. (R. 348) Absence of Tovalop could not frustrate the purpose of the charter. *Aaby* v. *States Marine Corporation, supra; Dover Steamship Company* v. *Summit Industrial Corporation, supra.*

D. Speed and performance.

DeSalvo, within the authority the law permits, added to the *pro forma* charter some details as to performance. There is no dispute as to what the fixture said. Spears, the person who was interested in the performance data, said the fixture telex contained all the information he desired. (R. 255-256)

Charterers were certainly not bound by DeSalvo's adding a penalty of $.25 if there was no agreement to it. *Christman* v. *Maristella Compania Naviera, supra.* It cannot be said than that this clause frustrated the purpose of the bargain.

What charterers have done here is finely comb through the agreement for tiny cracks. The law is not so primative that it will condemn a contract when the parties show an intent to be bound. *Williston on Contracts,* 3rd Ed. § 48, 157. This Court looks with disfavor on attempts after the fact to quibble over inconsistencies and clearly rebuffed such an attempt in *Christman* v. *Maristella Compania Naviera, supra,* particularly when the real reason for the repudiation of the charter is a break in the market. *Id.* at 854. Such was the case here. (R. 51, 263, 310)

POINT IV

National agreed to guarantee the charterparty and is a party to the charter agreement.

A. National guaranteed the charter.

The Court below made specific findings on the evidence before it that a guarantee by National would be given. The Court's specific findings will be summarized with references to the testimony and exhibits included.

The Court found that DeSalvo had authority to deal on behalf of National. The Court found that the fixture telex had been sent to National "for your account", (App. 51a, 42a) and that because of the manner in which the negotiations were conducted through DeSalvo. (App. 51a, R. 29) His authority to conclude this specific aspect was expressly given by Theodoracopulos (App. 51a, 65a, pp. 15-16, R. 28), and was implied by the past course of conduct between DeSalvo and National. (App. 51a, 65a, pp. 17-19; R. 30, 96, 120, 160, 233)

The Court found that an integral part of the negotiations for the fixture was the letter of guarantee. (App. 51a, 65a, pp. 17-19, R. 30) No limit was placed on DeSalvo's authority, in fact, he expressly stated in the fixture letter that this was part of the agreement to which Theodoraco-

pulos had not only made no objection, but had answered that an appropriate guarantee would be given. DeSalvo had, in the past on a previous fixture acting for this charterer, procured a guarantee of Hellenic's performance. (App. 51a, 65a, pp. 15-19; R. 28, 30-31, 213)

The Court then drew a conclusion of law based upon these facts that DeSalvo had actual as well as apparent authority to bind the charterer to it. *Christman* v. *Maristella Compania Naviera*, 349 F. Supp. 845, 851, aff'd 468 F.2d 620 (1972); *Restatement of the Law of Agency*, 2nd Series, Sec. 34; *Carver, Carriage by Sea*, 12th Ed., Vol. 1, Sec. 335.

The form of guarantee, which DeSalvo prepared but was never sent by him to Theodoracopulos because, as he testified, it could await the execution of the charter, was similar to one that had been used on a prior charterparty obtained by DeSalvo for Hellenic, executed by John Theodoracopulos on behalf of Hellenic, and attached to a letter agreement on letter head of both Hellenic and National, signed by Theodoracopulos as attorney-in-fact for Hellenic, who had also signed the prior charterparty on behalf of Hellenic. (App. 53a-54a) These findings are entirely supported by the Record. (R. 30, 96, 120, 160, 233; App. 65a, pp. 15-19, 78a, 81a)

The Court then found the letter of guarantee prepared by DeSalvo (App. 67a) was for execution by "Harry Theodoracopulos, National Shipping & Trading Company." The Court found this meant that National was to be the surety for the performance of Hellenic and thus liable as a respondent for the nonperformance of Hellenic. (App. 54a) This is supported both by the face of the document itself (App. 67a) and also from DeSalvo's contemporaneous notes (App. 61a) as well as by the testimony of National's President Spears who testified: (R. 302)

> "Q. 'With appropriate letter of guarantee' means that National Shipping & Trading was sup-

posed to provide a letter of guarantee. Is that not correct? A. This is my understanding, but it isn't clear.

Q. But it is your understanding? A. It is my understanding that Bethlehem Steel or the owners, I should say, wanted a guarantee of National Shipping & Trading Corporation."

Having discovered the requisite intent to issue a guarantee, the Court found that the memorandum contained in the fixture note was sufficient to bind National within the requirements of the New York Statute of Frauds (General Obligations Law, Section 5-701).

Charterers have attacked the sufficiency of this memorandum as satisfying New York requirements. This argument is without basis. Under the law of New York, DeSalvo had the power to bind National in this transaction even though he was not the agent of National. *Cerp Construction Co.* v. *J. J. Cleary, Inc.*, 59 Misc. 2d 589 (Sup. Ct., 1968), aff'd 31 A. D. 2d 784 (2d Dept., 1969). The Court found that according to the custom of the trade, DeSalvo did have the necessary authority, and this conclusion is supported firmly by the case law in this Circuit. *Christman* v. *Maristella Compania Naviera, supra,* p. 851, where the Court found expressly that ships' brokers had authority to make all ancillary agreements necessary to complete the transaction.

Charterers also argue that the form and content of the statement in the fixture telex is not a sufficent contract of guarantee. New York courts do not require any specific phraseology to effect a guarantee. In fact in one case, a guarantee sufficient to satisfy the Statute of Frauds was found made by the expression in a telegram "Guaranteeing 8,500 Dollar purchase style-wise 40 days terms." *LaMarr Hosiery Mills* v. *Credit Corp.,* 28 Misc. 2d 761 (N.Y. Civ. 1961). What is important to a New York court is that

there be evidence that there was an intention to issue a guarantee plus a memorandum sufficient to indicate that intention, with a memorandum being signed by the guarantor, or someone authorized to sign on his behalf. A telegram or telex, bearing a typed signature at the end is sufficient to satisfy the New York Statute of Frauds. *Trevor* v. *Wood,* 36 N.Y. 307 (1867). Telexes prepared by authorized brokers are also sufficient to satisfy the Statute of Frauds. *Joseph Denuncio Fruit Co.* v. *Crane,* 79 F. Supp. 117 (S.D. Cal., 1948), 188 F.2d 569 (9th Cir., 1949), cert. den. 342 U.S. 820. *2 Corbin on Contracts,* Section 525, p. 788.

The cases cited by charterers, notably *Savoy Record Co.* v. *Cardinal Export Corp.*, 15 N.Y. 2d 1 (1964) and *Salzman Sign Co.* v. *Beck,* 10 N.Y. 2d 63 (1961), held an individual signing for a corporation as an officer thereof was not personally liable to guarantee the obligations of the corporation, where there was no direct evidence that the individual intended to become personally liable. Appellees certainly do not disagree with the holdings of these cases.

These cases do not apply, however, when the evidence before the Court indicates a clear intention that the person signing the contract intends to be bound as a guarantor thereto. When such evidence exists, New York courts do not hesitate to find the individual so signing the contract to be personally bound thereto. *Mencher* v. *Weiss,* 306 N. Y. 1 (1953). In this case, National's President, Spears, testified that National was in the business of guaranteeing its subsidiaries and affiliates. (R. 253)

The case of *Scheck* v. *Francis,* 26 N.Y. 2d 466 (1970) does not have any relevance to this case at all because in that case the Court found that no written agreement was ever signed concerning an agency contract which would have to be evidenced by a signed writing according to the New York Statute of Frauds. In the *Scheck* case, it did

not appear that there had ever been issued anything similar to a fixture telex, as was clearly issued in the case at bar.

B. National is bound to the agreement to arbitrate.

The Court made specific findings to the effect that National was not only a guarantor of the charterparty, but was so closely involved in its negotiation and execution that it agreed to be a party thereto. The Court made this ruling based both on the specific evidence of the conduct and representations of the parties in the instant transaction, and also based on the custom and practice of the trade generally as well as the prior conduct of National. The Court admitted that the fixture telex did not specifically say that the guarantee would be given by National, but the Court held the testimony was clear that this was the only guarantor which the parties had in mind. (R. 302) The language of the fixture letter clearly indicates that this is a fair reading. The language of the fixture found at (App. 42a) states:

> "CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA, SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE"

The Court found that Theodoracopulos agreed to give an appropriate letter of guarantee.

The Court then made findings which indicated that National was so intimately entwined with the affairs of Hellenic that it could be considered the real party to the agreement. The Court found that DeSalvo, who had known Theodoracopulos for many years, considered him to be, in fact, National as he was the owner and its principal stockholder. (App. 65a, p. 4) wherein DeSalvo said of Theodoracopulos that "He is the owner. I don't know what his title is. He owns the company, to my understanding." This was also conceded by Theodoracopulos. (R. 298) Theodoracopulos' father (John Theodoracopulos)

was the principal stockholder of Hellenic. (R. 298) Hellenic had no office in the United States, but all business and correspondence went through National's offices, and Harry Theodoracopulos was the attorney-in-fact for Hellenic. (R. 299; App. 79a, 81a) Theodoracopulos admitted that Lloyds Register, a widely distributed and well-respected listing of vessels and vessel owners, had listed Hellenic as care of National in reference to a vessel which had been owned by Hellenic. (R. 299)

More important, perhaps, was the Court's specific finding that National had represented itself as the parent of Hellenic. The fixture telex (App. 42a) clearly designates Hellenic as subsidiary of National. DeSalvo's notes which DeSalvo testified contained information which was given him by Theodoracopulos, indicate that Hellenic was a subsidiary of National. (App. 61a) Theodoracopulos, upon receipt of the fixture letter on March 17, 1971, did not correct this representation. Theodoracopulos, though denying that he would have said this to DeSalvo, clearly equivocated in his testimony. (R. 214) This is a representation which was relied upon by Interocean because the guarantee was clearly an essential part of the bargain.

A surety can be held a party to the contract which it guarantees if its identification with the negotiations of the contract or the performance of the contract is sufficiently close. This is, in each case, a question of fact. A case where this was so held is *Modern Brokerage Corporation* v. *Massachusetts Bond. & Ins. Co.*, 54 F. Supp. 939 (SDNY, 1944), in which the Court found at page 940:

> "The contract, the performance of which is guaranteed by the defendant, was not in terms made a part of the bond; but there is no doubt in my mind that as defendant guaranteed its performance by the Quincy Company, the terms of the contract are as much a part of the bond as if they were expressly set forth in it. Otherwise, it could not be ascertained

> what defendant guaranteed; the contract measured its obligations, and it was not bound by anything beyond. Defendant obviously stands in the shoes of the principal contractor."

In this case, the guarantee was never actually executed, nor was the guarantee a specific clause of the charterparty. There was, however, nothing significant in this because DeSalvo's reason for not issuing a form of a guarantee was simply because the mechanics of executing the documents agreed to had not reached that point. (R. 123) The fixture note, which did embody the binding contract between the parties, did refer to the Mobiltime form. This form contains an arbitration clause and this reference is binding upon the parties to the agreement. *Garnac Grain Company, Inc.* v. *Nimpex International Inc.*, 249 F. Supp. 986 (SDNY, 1964) held:

> "Section 4 requires at least a written fixture making reference to a standard charter containing an arbitration clause before arbitration can be compelled."

This Court has held that the Federal Arbitration Act contains no statute of frauds, and also that parties who do not personally sign a contract can be bound to it. In *Fisser* v. *International Bank*, 282 F.2d 231, 233 (2 Cir., 1960):

> "It is true that under the Act, a 'written provision in any martime transaction * * * to settle by arbitration a controversy thereafter arising out of such * * * transaction' is the *sine que non* of an enforceable arbitration agreement. 9 U.S.C. § 2, 4. It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision, but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written

> provisions and, of course, parties can become contractually bound absent their signatures."

In any event this Court would have ancillary jurisdiction over National under the principles of *Dery* v. *Wyer*, 265 F.2d 804 (2 Cir., 1959), since there was admittedly federal jurisdiction over the main cause of action (an action brought under the FELA for injury to a railroad worker), the defendant was permitted to implead the third-party even though there were no grounds for jurisdiction as to the third party; both defendant and third-party defendant being New York corporations. The same principle should apply here and National should be brought in so that this matter can be decided once and for all.

Charterers at pages 64-66 of their brief cite a long series of cases in which it has been held that a party, sometimes a guarantor, sometimes not, has not been required to arbitrate because the Court found on the facts therein that the parties sought to be compelled to arbitrate was not a party to the agreement. Interocean does not quarrel with the findings of these cases, and feels that under the facts they were probably decided correctly. The issue in each of the cases they have cited in their brief is, however, precisely that the determination of who is bound by the agreement is a question of fact. In this case for the reasons cited above, the Court felt the relationship between National and Hellenic within the context of this negotiation, coupled with the express representations of Mr. Theodoracopulos, were sufficient to indicate that National intended to be bound by the agreement along with Hellenic. In a case such as this, this finding is not to be overturned because it is not "clearly erroneous". *Orient Mid-East Lines* v. *Albert E. Bowen, Jr., supra,* at 574; *Gardner* v. *The Calvert, supra* at 399; *Gemini Navigation, Inc.* v. *Phillipp Brothers, supra* at 4593 which stated:

> "As a rule, we are unwilling to disturb the factual determinations reached by an able and experienced trial judge."

POINT V

The Court's evidentiary rulings were proper.

For purposes of convenience Interocean will answer the various contentions launched in Point IV of charterers' brief, pp. 67-73, in the order and according to the grouping in which they were made.

A. The Court properly interpreted DeSalvo's testimony and properly limited his cross-examination.

The Court found DeSalvo's testimony "consistent and perfectly credible". (App. 51a) Charterers admit they do not challenge the Court's prerogatives to make rulings on credibility. They are completely silent, however, on the reasons the Court found DeSalvo's testimony to be credible. These reasons have been set out various times above in the brief, and rest primarily on Theodoracopulos' somewhat unbelievable testimony that he threw his contemporaneous notes away after he had conferred with his counsel.

Charterers first argue that DeSalvo had a financial interest in the transaction. This, of course, is true and was never denied. The important thing to note here is that DeSalvo's financial interest depended not on his rushing to conclude a premature fixture, but in his conclusion of a proper fixture, because DeSalvo's testimony was plain that if the fixture did not bear fruit, he would receive nothing. He, in fact, never received a commission for the Oswego Reliance fixture. (R. 83) DeSalvo's financial interest was in doing his job properly.

The argument at page 67 that DeSalvo chose the word "fixture" is clearly specious. Theodoracopulos and Spears both testified that they understood what the word "fixture" meant, and they testified it meant he conclusion of he negoiations. (R. 232, 297) The Court further concluded that neither Theodoracopulos nor Spears protested the use of

the word "fixture", nor quibbled with the fixture telex. This has support in the Record. (R. 34-35) At page 68, charterers quible with this finding, saying that Theodoracopulos was very clear in his memory that he had called DeSalvo on the morning of March 18, 1971 and was extremely irate that the fixture telex had been sent out. This ignores the fact that the Court did not believe Theodoracopulos for good reason. This argument also ignores DeSalvo's clear recollection that Theodoracopulos never protested the fixture telex, and also ignores DeSalvo's testimony that in his conversation with Theodoracopulos they discussed only general market conditions. (R. 34-35, 139, 141) Appellant's statement at page 68, "We submit it is highly significant that DeSalvo denies none of this," is clearly erroneous and is contradicted in the Record at pages 139 and 141.

Charterers' argument as to an alleged restriction of their right to properly cross-examination DeSalvo is also without merit. Taking them in order, charterers "claim" that DeSalvo should have been able to answer four questions. First: "Q. You don't claim, do you, as a broker negotiating on behalf of two parties that because you put out a fixture letter or what you choose to call a fixture letter that necessarily binds both of the parties, do you?" (R. 184-185) Second: "Q. So you have to agree the negotiations were not concluded on Wednesday; is that correct?" (R. 70) Third: "Would you agree that an appropriate letter of guarantee was an essential term of this business?" Fourth: "Q. How could you have completed the transaction without the execution of some form of guarantee?" The questions require DeSalvo to make a conclusion as to the ultimate effect of the fact to which he has testified. Experts are not permitted to draw legal conclusions. If he had been allowed to answer the question, the answer would probably have been material error. *Huff* v. *United States*, 273 F.2d 56, 61 (5th Cir., 1959), wherein the Court refused to allow a Government's Customs in-

spector to testify whether, based on his 28 years experience, certain jewelry was of a commercial nature rather than personal effects. The Court found this testimony reversible error. Interocean feels that it is significant that charterers can cite no cases permitting them to ask these questions.

B. The Court did not make rulings which were not supported by evidence in the record.

Charterers first argue at page 71 of the brief that the Court noted that the market had declined and that the fixture was published in trade publications. Taking these allegations in order, it is clear that there was evidence in the Record that the market had fallen March 24. DeSalvo testified to this effect. (R. 51) Spears testified to this effect. (R. 263, 310) The Court was also on firm ground in concluding that the break in the market, and the subsequent loss of the speculative value of charterers' venture, was the real reason that they cancelled the contract. This was a material finding in the case, *Christman* v. *Maristella Compania Naviera, supra.*

As to the second issue, there was testimony in the Record from which the Court could properly conclude that the fixture was reported in publication used in the shipping trade within three or four days after its fixture on March 17, 1971. The evidence occurs in the cross-examination of Thomas Spears. (R. 511) Mr. Spears was cross-examined with reference to these publications. He was asked if he was familiar with Charles I. Webber Company. He stated that he knew of them. When asked if they received their reports, he stated that they receive them only recently. He was asked if he received *Maritime Research Reports.* He said no. He was asked if he read the *Journal of Commerce.* He stated that he did. He was asked if he knew that the fixture of the vessel was reported in the *Journal of Commerce,* Monday, March 22. To that he stated he did not know. He was asked if he made any

note of that, and he said he did not remember reading it in the *Journal of Commerce.*

The Court had the opportunity throughout this cross-examination of examining the demeanor of the witness on the stand. From its observation of the demeanor as the witness was cross-examined as to these trade publications, the Court could conclude that the witness was not telling the truth, and that the fixture had been reported to the trade.

It is interesting to note that charterers do not cite any cases indicating that it would be reversible error, even if there were no support in the Record for these findings. The reason is that the general conclusions which these findings support have abundant support elsewhere in the Record. Appellees have been able to find only one case in which there actually were findings made which were completely dehors the Record. In *Processteel, Inc.* v. *Mosely Machinery Company,* 421 F.2d 1074 (6 Cir., 1970), the Court upheld the decision below even though the Judge had rested his findings in part on an admission which he gleaned from a deposition of one of the witnesses. The deposition had not been introduced into evidence. The Court said it did not approve of the practice of using parts of a deposition that was never offered in evidence, but that this did not constitute reversible error.

C. Charterers' other complaints about the evidence are without merit.

At pages 72 to 73 of the brief, charterers adduce eight evidentiary errors they feel the Court made. For the sake of convenience, these will be dealt with in the order they were listed in the brief.

At (a) of this argument, they state that the Court erred in finding the broker was the agent for both parties. This finding was supported by the Record (R.29) and was

admitted by charterers' attorney on the record, (R. 9) and is certainly proper under the custom and practice of the trade. *Christman* v. *Maristella Compania Naviera, supra.*

At (b), they state that the exclusion of various paragraphs of the mobiltime form was suggested by DeSalvo and not by Theodoracopulos. Aside from whether or not this alleged error has any significance at all, a point which appellant does not assert, in the Record at page 116, DeSalvo testifies that Theodoracopulos did make the suggestions.

At (c) charterers say the words "You are confirmed" were not the words of Theodoracopulos, but of DeSalvo himself. In point of fact, however, the words "You are confirmed" were DeSalvo's best recollection of what Theodoracopulos had said. (R. 28, 119)

At (d) charterers grossly misquote the Court. The Court properly understood DeSalvo's actual testimony as being "appropriate guarantees could be given". The Court, in its decision, did not misconstrue this quotation, but simply inferred from that according to the practice of the trade that Theodoracopulos would give an appropriate guarantee.

At (e) charterers once again argue that Theodoracopulos complained on March 18 that they made a prompt protest to the issuance of a fixture telex. The Court did not believe this, and as has been pointed out above in this brief, there was abundant evidence in the Record which would support the Court's decision.

At (f) the variance between the oral agreement as reflected by DeSalvo's notes, and what was actually mistyped in the fixture telex is not an error of significance. It is to be expected in a ship brokerage trade, and it does not void the basic bargain. *Christman* v. *Maristella Compania Naviera, supra.*

At (g) charterers once again quibble over the significance of the drydock clause. There was abundant evidence in the Record from which the Court could conclude that this was not a significant clause, and that it did not frustrate the purpose of the bargain, but was a clause which was generally worked out after trading patterns of the vessel were known. Theodoracopulos himself admitted this. (R. 246)

At (h) charterers witness was not convincing.

CONCLUSION

The findings and conclusions of the Court below are supported by substantial credible evidence in the record, and the Court's order directing both National and Hellenic to proueed to arbitration should be affirmed.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Petitioner-Appellee
One State Street Plaza
New York, New York 10004

JAMES M. ESTABROOK
LENNARD K. RAMBUSCH
STEPHEN R. REMSBERG
of Counsel